INDEX

	Page
INTRODUCTION	2
STATEMENT OF THE CASE	2
ARGUMENT	8
QUESTION PRESENTED (Restated)	8
DID THE STATE COURT DECIDE A FEDERAL QUESTION OF SUBSTANCE NOT THERETOFORE DETERMINED BY THIS COURT, OR DECIDE IT IN A WAY PROBABLY NOT IN ACCORD WITH DECISIONS OF THIS COURT WHEN IT RULED THAT A LEASEHOLD INTEREST IN PUBLIC LAND USED FOR A PUBLIC PURPOSE WAS EXEMPT FROM AD VALOREM TAXATION UNDER STATE LAW?	
CONCLUSION	23
CERTIFICATE OF SERVICE	24

APPENDIX

Petition for Writ of Certiorari to the District Court of Appeal, Third District, in the Supreme Court of Florida ..... App. 1-20

TABLE OF AUTHORITIES

Case	Page
Allied Stores of Ohio v. Bowers, 358 U.S. 522 (1959)	18
American R. Express Co. v. Levee, 263 U.S. 19 (1923)	10, 11
American Sugar Refining Co. v. Louisiana, 179 U.S. 89 (1900)	19
Armour Packing Co. v. Lacy, 200 U.S. 226 (1906)	19
Bell's Gap R. Co. v. Pennsylvania, 134 U.S. 232 (1890)	19
Chapman v. Crane, 123 U.S. 540 (1887)	14
Citizens Nat. Bank v. Durr, 257 U.S. 99 (1921)	19
Dade County et al v. Marine Exhibition Corp., Nos. 73-1306 & 73-1307, D.C.A. Fla. 3d District	7
Dade County v. Pan American World Airways, 275 So.2d 505 (Fla. 1973)	14, 15, 16, 17
Durley v. Mayo, 351 U.S. 277 (1956)	13

TABLE OF AUTHORITIES (cont.)

Case	Page
Flourney v. Weiner, 321 U.S. 253 (1944)	17
Harding v. Illinois, 196 U.S. 78 (1904)	14
Honeyman v. Hanan, 300 U.S. 14 (1937)	14
Interstate Circuit, Inc. v. Dallas, 390 U.S. 676 (1968)	10
Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356 (1973)	19
Lynch v. New York, 293 U.S. 52 (1934)	14
Market St. Ry. Co. v. Railroad Comm'n, 324 U.S. 548 (1945)	9
Mental Hygiene Dept. of Cal. v. Kirchner, 380 U.S. 194 (1965)	13
Nash v. Florida Industrial Comm'n, 389 U.S. 235 (1967)	10
Rice v. Sioux City Memorial Park Cem. 349 U.S. 70 (1955)	12

TABLE OF AUTHORITIES (cont.)

Case	Page
State of Maryland v. Baltimore Radio Show, Inc., 338 U.S. 912 (1950)	12
Stratton v. Stratton, 239 U.S. 55 (1915)	10, 11
Trimble v. Seattle, 231 U.S. 683 (1914)	17, 18
Constitutions, Statutes and Rules	
28 U.S.C.A. §1257(3)	8, 9, 11, 14, 17, 21, 22
Fla. Statutes §192.62	5
§196.012(5)	5, 6
§196.25	5, 15, 17
§196.199(2)(a)	5, 15, 17, 21
Supreme Court Rules	
Rule 19	8, 17
Rule 19(a)	12
Texts, Encyclopedias, Articles, etc.	
Annotation 7 L. Ed. 2d 1025 (1962)	10

in the
Supreme Court
of the
United States

CASE NO. 74-320

DADE COUNTY, a political subdivision of the State of Florida; R. RAY GOODE, as County Manager of Dade County, Florida; A. H. BLAKE, as Acting Tax Assessor of Dade County, Florida; R. K. OVERSTREET, as Tax Collector of Dade County, Florida; and J. ED STRAUGHN, Director, Department of Revenue, State of Florida,

Petitioners,

vs.

MARINE EXHIBITION CORPORATION, a Florida corporation,

Respondent.

REPLY TO PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT

INTRODUCTION

The Petitioners are the ad valorem tax authorities in in Dade County, Florida [hereinafter "Dade County" or "Petitioners"]. They were defendants in the Dade County Circuit Court (the trial court) and Appellants in the District Court of Appeal of Florida, Third District. Marine Exhibition Corporation was Plaintiff in the trial court and Appellee in the District Court of Appeal, Third District. Marine Exhibition Corporation will be designated herein as "Respondent."

Record references will be to the entire certified record in the Third District Court of Appeal. References thereto will be prefaced by the letter "R.", followed by the appropriate page number. Respondent's Appendix will be cited as "A.", followed by the appropriate page number. All emphasis herein is supplied unless otherwise noted.

STATEMENT OF THE CASE

Petitioners' Statement of the Case is incomplete in the following particulars:

Marine Exhibition Corporation is a lessee, under the terms of a 1954 lease agreement, of certain land in Dade County, Florida, owned by Dade County. (R. 29). On the leased property is constructed a public marine aquarium for the exhibition of different species of fish, aquatic mammals, etc., which is known as the "Miami Seaquarium."

Dade County (the Petitioners herein) acquired the land for the Seaquarium site from the State of Florida in 1940 by a deed containing a restriction that lands be used *only for public purposes.* (R. 111-120). Pursuant to the

lease terms with the Petitioners, Respondent became *obligated* to erect and operate such a *public aquarium.* This was accomplished by Respondent, and on January 1, 1972 such a public marine aquarium was operating on the subject leasehold site and the courts below have judicially held that it was being used for a *public* (not a private) purpose on the aforesaid date. (R. 219-220).

The lease agreement between the Petitioners and Respondent provides that the local taxing authorities (the Petitioners) shall exercise substantial control over Respondent's leasehold use of the public land. Specifically, it provides that at the conclusion of the lease term, or upon its termination, the Petitioners acquire complete title and ownership to the operating facilities constructed on the property and any and all future improvements thereon. (R. 29-41). The Petitioners are paid a percentage of gross revenue from general admissions and gross revenue from incidental income, including the incidental concession income. (R. 29-41). Also, admission rates must be approved by the Dade County Commission, concessions may not be operated without their approval, the books of the Respondent are open at all times for inspection by the county, and specified insurance coverage on the facility is subject to county approval. (R. 29-41).

In their Statement of the Case, Petitioners have referred to "other tourist attractions" in an attempt to indicate a factual similarity between "tourist attractions" generally and the Respondent's leasehold use of this publically owned land. (R. 109).

However, no such "similarity" in fact exists. Apparently, Petitioners attempt to assert that "other private

tourist attractions" are in the same class for tax exemption purposes as Respondent because, they say, the "use" of the property is the same. However, Petitioners overlook several important differences in the comparison. Unlike a private tourist attraction, Respondent *leases county-owned land* and operates a marine exhibit thereon for a *public* purpose. Its leasehold interest in county-owned property when used for public purposes is tax exempt under Florida law. (R. 226-227). There is *absolutely no evidence* in the record (nor do the Petitioners contend) that the "other tourist attractions" referred to by Petitioners, such as the Miami Serpentarium, the Monkey Jungle, the Orchid Jungle or the Parrot Jungle[1] are either:

1. operated under *leases* which are being taxed by the Petitioners pursuant to Florida law authorizing a tax upon leasehold interests, as distinguished from being taxed for their ownership of the land in fee simple; or

2. if operated as leaseholds, that they lease their lands from the public or the government as the Respondent does so as to initially qualify for the exemption classification applicable to the Respondent; or

3. perform a public purpose thereon, according to Florida law.

Significantly, Petitioners do not point to or argue in their petition that *any* "tourist attraction" in Dade County

[1]These were the other "tourist attractions" mentioned in the Tax Assessor's affidavit in opposition to Respondent's motion for summary judgment in the trial court. (R. 109).

leased its land from the county and made an exempt use of its leasehold interest thereof for 1972 (as the undisputed facts below established did occur at the "Miami Seaquarium" leasehold facility). (R. 226-227). As will be explained more fully later, such differences are critical to Petitioners' alleged federal equal protection claim.

From the inception of the lease agreement between the Petitioners and Respondent in 1954 to 1961, leasehold interests (to be distinguished from fee title interests) in Florida, whether created in privately owned or governmental-owned property, were not subject to taxation. In 1961, the Florida legislature adopted F.S. §192.62, *Florida Statutes*,[2] which did provide for taxation of certain leasehold interests created in property owned by governmental agencies if not leased for a public purpose use. By its terms, the statute[3] expressly exempts public purpose uses when:

> "Governmental, municipal or public purpose or function shall be deemed to be served or performed when the lessee under any leasehold interest created in property of the United States,

[2]F.S. §192.62. *Florida Statutes*, subsequently reenacted verbatim in F.S. §196.25, *Florida Statutes* (1971), provided a statutory definition:

> [T]he property is owned or used by the State, any county, municipality, or public entity or authority created by statute *and is leased or otherwise made available to such person, firm, corporation, partnership or organization by such public body for a consideration in the performance by the public body of the public function or public purpose authorized by law*, or when property prior to the effective date of this act was leased for valuable consideration for the purpose not otherwise exempt hereunder.

[3]The present exemption statutes applicable to the 1972 exemption and this case are found in F.S. §196.199(2)(a) (1973) and F.S. §196.012(5) (1973).

> the State of Florida or any of its political subdivisions, or any municipality, agency, authority or other public body corporate of the state is demonstrated to perform a function or serve a governmental purpose which could properly be performed or served by an appropriate governmental unit, or which is demonstrated to perform a function or serve a purpose which would otherwise be a valid subject for the allocation of public funds. . . ." F.S. §196.012(5), *Florida Statutes.*

In light of this statute, the Petitioners did not attempt to assess ad valorem taxes against the Respondent until 1969. In that year, Respondent appeared before the Dade County Commission sitting as the tax Board of Equalization to contest the 1969 tax. The Board took testimony, and confirmed the fact that the "Miami Seaquarium" performed a public function and should, therefore, be exempted from ad valorem taxation. (R. 157). In 1970, 1971 and 1972 there was no change in the nature or character of the operations of the Seaquarium, except that substantial improvements in the facility were made. (R. 29). Nonetheless, in 1970, the Petitioners reversed their position and attempted to tax the leasehold interest which Respondent has in the publicly owned property. (R. 156-218). The same effort has been made for the tax years 1971, 1972 (the subject of the instant case), 1973 and 1974. Respondent's leasehold interest in the public property has been exempted from ad valorem taxation for the tax years 1970 and 1971 by order of the circuit court. The Petitioners have taken a consolidated appeal from those orders for the 1970 and

1971 tax years to the District Court of Appeal, Third District, and said appeals are presently pending before the court.[4]

The instant action was instituted on November 8, 1972 by the Respondent to adjudicate its right to have its leasehold interest in the aforesaid public land exempt from ad valorem taxation for the 1972 tax year. The issue before the trial court was whether Respondent's leasehold interest was (on January 1, 1972) used for a public purpose under state law. Upon motion by Respondent, the trial court entered summary final judgment holding, as a matter of law, that Respondent's leasehold interest was entitled to be exempt from ad valorem taxation for the 1972 tax year based on undisputed facts as to its public use as of January 1, 1972. The trial court made no express ruling on Petitioners' alleged federal equal protection argument. (R. 219-220).

This summary final judgment was affirmed *per curiam* by the District Court of Appeal, Third District, on the grounds that there was no dispute of material or genuine fact as to the "public use" of the leasehold by Respondent on January 1, 1972, and that Respondent's leasehold was exempt from taxation under applicable state law. (R. 226-227). Again, the appellate court opinion was silent as to any holding or ruling on Petitioner's federal claim. (R. 226-227).

---

[4] *Dade County et al v. Marine Exhibition Corp.*, Nos. 73-1306 and 73-1307, District Court of Appeal of Florida, Third District. The only difference between the instant action and the consolidated appeal is that the consolidated appeal is from the final hearing before the court, and the instant action was disposed of by summary judgment.

On July 24, 1974 Petitioners timely filed a petition for certiorari in the Florida Supreme Court to review that decision of the Third District Court of Appeal, the same decision which they seek to review herein. (Petition for Certiorari, p. 4, n. 4; A. pgs. 1-21). Said petition for certiorari is presently pending there, the highest court of the State of Florida with possible jurisdiction over this cause. (Petition for Certiorari, p. 4; A. pgs. 1-21). The pending petition for certiorari before this Court was filed by Petitioners on September 20, 1974.

ARGUMENT

QUESTION PRESENTED (Restated)

DID THE STATE COURT DECIDE A FEDERAL QUESTION OF SUBSTANCE NOT THERETOFORE DETERMINED BY THIS COURT, OR DECIDE IT IN A WAY PROBABLY NOT IN ACCORD WITH DECISIONS OF THIS COURT WHEN IT RULED THAT A LEASEHOLD INTEREST IN PUBLIC LAND USED FOR A PUBLIC PURPOSE WAS EXEMPT FROM AD VALOREM TAXATION UNDER STATE LAW?

(i) *The Judgment below is not the judgment of the highest court in the State of Florida*

Before considering whether Petitioners have satisfied the requirements of Rule 19, *Supreme Court Rules*, for reviewing decisions of state courts, an obvious jurisdictional defect under 28 U.S.C.A. §1257(3) exists in the pending petition for certiorari which requires a denial thereof.

Petitioners invoke 28 U.S.C.A. §1257(3) for the certiorari jurisdiction of this Court, which provides in pertinent part:

> *Final judgments or decrees rendered by the highest court of a State in which a decision could be had*, may be reviewed by the Supreme Court as follows:
>
> * * *
>
> (3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the grounds of its being repugnant to the Constitution, treaties or laws of the United States, *or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.*

Under this provision, Petitioners have sought review of the judgment of an intermediate state appellate court, the District Court of Appeal of Florida, Third District, even while a discretionary petition for certiorari to review the same decision is pending in the Florida Supreme Court, the highest court in the State of Florida. (Petition for Certiorari, p. 4; A. pgs. 1-21)

A state court judgment, to be within the jurisdiction of this Court under §1257 must be "final" in two senses: (a) it must be subject to no further review or correction in any other state tribunal, and (b) it must be an effective determination of the litigation. In other words, it must be the final word of a final court. *Market St. Ry. Co. v.*

Railroad Comm'n, 324 U.S. 548 (1945). The petition herein patently fails to meet the first requirement of "finality."

This Court has consistently held that a petition for certiorari to an intermediate state appellate court is improper when there is pending a discretionary writ to the highest state court to review the same decision. In *American R. Express Co. v. Levee*, 263 U.S. 19 (1923), Mr. Justice Holmes stated for the Court:

> A preliminary objection is urged that the present writ of certiorari was addressed to the court of appeal, and not to the supreme court. But, under the Constitution of the state, the jurisdiction of the supreme court is discretionary (Art. 7, §11); *and although it was necessary for the petitioner to invoke that jurisdiction in order to make it certain that the case could go no farther.* (Stratton v. Stratton, 239 U.S. 55, 60 L.Ed. 142, 36 Sup. Ct. Rep. 36), *when the jurisdiction was declined, the court of appeal was shown to be the highest court of the state in which a decision could be had. Id.* at 20-21.

See also, Interstate Circuit, Inc. v. Dallas, 390 U.S. 676 at n. 1 (1968); *Annotation*, 7 L.Ed. 2d 1025 (1962). Also, in *Nash v. Florida Industrial Comm'n*, 389 U.S. 235 (1967), the Court, speaking through Mr. Justice Black, recognized and reaffirmed this principle when it stated that *only after* it was determined that the petitioners therein could not call upon the Florida Supreme Court for review, could the Florida District Court of Appeal be considered the "highest court in Florida" wherein a decision could be

had as required by 28 U.S.C.A. §1257(3). *Id.* at 238, n. 2. *See also, Stratton v. Stratton*, 239 U.S. 55 (1915) (writ of error).

This petition for certiorari to the Florida District Court of Appeal, while a discretionary writ is pending before a higher state court, is obviously premature and should be denied for want of jurisdiction.

It avails Petitioners nothing to attempt to avoid the consequences of their premature petition by seeking a delay in its consideration by this Court until after the Florida Supreme Court rules on its jurisdiction.[5]

First, it is respectfully submitted that this Court simply does not have jurisdiction to entertain such an untimely and premature petition. 28 U.S.C.A. §1257(3). Yet, there are also practical reasons to reject Petitioners' attempt to delay consideration of its petition and deny the petition. Assuming, *arguendo*, that certiorari would ever lie to review the issues raised in this action, it appears that there is sufficient time and an adequate mode of relief open to Petitioners if they wish to seek this Court's review after the Florida Supreme Court completes its review. *See American Railway Express Co. v. Levee, supra* at 21. If required to await the decision of the Florida Supreme Court to seek this Court's review, Petitioners would not suffer any prejudice or harm. Conversely, if this Court defers consideration of this premature and untimely petition, it would result in unnecessary and duplicative expense

[5]Petitioners have filed a "Motion to Defer Consideration of Petition for Certiorari" simultaneously with their petition, which is not authorized by the *Supreme Court Rules*, and for the reasons stated herein and in Respondent's Response filed of record on or about September 27, 1974, should be denied.

to the parties and be a waste of judicial time and effort for the reasons set forth in Respondent's Response to Petitioners' Motion to Defer Consideration of Petition of Certiorari, filed of record on or about September 27, 1974. Sound judicial economy requires a denial of the motion to defer consideration.

Thus, the pending petition for certiorari should be duly considered by the Court, and denied for want of jurisdiction.

(ii) *The state court did not pass upon a reviewable federal question in conflict with applicable decisions of this Court.*

Petitioners have failed to satisfy the Rule 19(a), *Supreme Court Rules*, criteria for reviewing decisions of state court judgments. In such cases, certiorari will be granted to review a state court judgment if (a) a state court has decided a federal question of substance not theretofore determined by this Court, or (b) has decided it in a way probably not in accord with applicable decisions of this Court. These elements necessary for certiorari review must be considered in the context of this Court's practice not to undertake review of state court judgments which do not pass upon federal questions of substance or importance. *Rice v. Sioux City Memorial Park Cem.*, 349 U.S. 70 (1955); *State of Maryland v. Baltimore Radio Show, Inc.*, 338 U.S. 912 (1950).

Before taking up the arguments under this point, it is necessary to correct the record and call to the Court's attention a misstatement of the Petitioners in what they describe as the "ruling" by the court below on Petitioners'

alleged federal claim. Petitioners assert that "the appellate court held that different treatment of members of the same class did not preclude summary judgment." (Petition for Certiorari, at p. 4). This simply is not accurate. Not one of the courts below have ever said one word about the Petitioners' alleged federal equal protection claim. It did not seem to merit comment.

To satisfy the requirements of certiorari jurisdiction, it is axiomatic that a federal question must be determined and passed upon by the state court. *Durley v. Mayo*, 351 U.S. 277 (1956); *Mental Hygiene Dept. of Cal. v. Kirchner*, 380 U.S. 194 (1965). But, the opinion below is simply a state court decision construing a state ad valorem tax exemption statute and its factual application to the Respondent. Even a cursory review of the state court opinion supports this construction. After a brief recitation of the facts, the Third District Court of Appeal summed up the issue before it:

> The appellant [Petitioners] maintains that a genuine issue of material fact exists as to whether or not the property was on January 1, 1972 used for a public purpose.

The appellate court went on to quote the exact portion of the affidavit[6] that Petitioners cite to in their petition, and to hold:

> The affidavit is insufficient to raise an issue. The fundamental questions presented by this case have

[6]The affidavit of A. H. Blake in opposition to Respondent's Motion for Summary Judgment. (R. 109).

been answered by the Supreme Court of Florida in *Dade County v. Pan American World Airways*, Fla. 1973, 275 So.2d 505.

Affirmed.

In so holding, the District Court of Appeal stated that it was undisputed in the record that Respondent's leasehold was used for a "public purpose" and that summary judgment in Respondent's favor was appropriate in light of the Florida Supreme Court's opinion in *Dade County v. Pan American World Airways, supra*, (R. 226-227). The alleged federal equal protection claim of Petitioners was not even mentioned by the District Court of Appeal in its opinion. (R. 226-227). Certainly, it hardly can be seriously contended, as the Petitioners do, that the court "*held* that different treatment of the same class did not preclude summary judgment." (Petition for certiorari, p. 4). At best, Petitioner's alleged federal claim was only implicitly, by its terms, considered and passed upon by the state appellate court.[7] *Chapman v. Crane*, 123 U.S. 540 (1887).

Even assuming that a federal right was passed upon by the state court, it is clear that there is no reviewable federal question proper for the certiorari jurisdiction of this Court.

[7] It may, in fact, be argued that there was no determination of any federal right by the state appellate court. Numerous cases can be cited for the principle that where a federal question was not determined by the state court (and there were valid reasons for the court not to do so), and the federal question was not necessary to the judgment rendered by the state court, this Court does not have certiorari jurisdiction. *Honeyman v. Hanan*, 300 U.S. 14 (1937); *Lynch v. New York*, 293 U.S. 52 (1934). And this is particularly so where the federal right arises, as it allegedly does here, under the third clause of 28 U.S.C.A. §1257. *Harding v. Illinois*, 196 U.S. 78 (1901).

In deciding that Respondent's leasehold interest was exempt from ad valorem taxation for the 1972 year, the state court below construed the applicable state ad valorem tax statutes as interpreted by the state courts in Florida. The decision below specifically cited *Dade County v. Pan American World Airways, Inc.*, 275 So.2d 505 (Fla. 1973), one of the more recent and controlling state decisions in Florida on ad valorem tax exemption for leasehold interests. In that case, the Florida Supreme Court affirmed a summary judgment entered against Dade County (the same petitioners herein) on the issue of the "public purpose" exemption claimed by various commercial airlines and others at the Miami International Airport. In *Pan American*, the county sought to tax the leasehold interests of the commercial airlines at the airport for the 1970 tax year. The airport site is owned by the public (county) and portions thereof are leased to various private businesses for their commercial operations. The Florida Supreme Court, in interpreting the applicable state law,[5] held that a private leasehold interest on public land is tax exempt if the underlying object of the lessee's private, commercial operation is the performance of a "public purpose." In explaining this conclusion, the Florida Supreme Court said:

> By this analysis we have not changed the ordinary meaning of 'exclusive' from its dictionary definition of 'single', 'sole' and 'entirely'. Instead, we have pointed out that the requirement for 'exclusive *use*' (emphasis by the Court) is not affected by a private purpose incorporated into the meaning of 'public purpose.' Stated in another

[5] F.S. §196.25. *Florida Statutes*, substantially same statute (renumbered F.S. §196.199(2)(a)) relied upon by Respondent for exemption of its leasehold interest.

> way, the property must be used *exclusively* (emphasis by the Court) for purposes designated as 'public purposes' which may include such an incidental private purpose as here . . .
>
> • • •
>
> Applying these principles to the situation before us, we conclude that the property leased to the airline is used *exclusively* (emphasis by the Court) for public purposes. The parties have stipulated that the airport facility is used for a public purpose; *the incidental private purpose of a profit-making venture by the airline has merged into the meaning of the stipulated 'public purpose'*; and there is no evidence in the record whatever to indicate that the property is not being used solely for the stated 'public purpose'.
>
> *Id.* at 512.

Relying on this interpretation of the state tax statutes by the Florida Supreme Court, the appellate court in the decision herein simply held that Respondent's use of its leasehold interest was for a "public purpose" under the exemption statutes and was entitled to be exempt from ad valorem taxation for the 1972 tax year.

It is apparent then that there is no reviewable federal question raised by the decision of state court. The state court judgment below merely construed the applicable state ad valorem tax statutes as interpreted by the Florida Supreme Court in *Dade County v. Pan American World Airways, Inc., supra.* The decision below did not affect any federal right, title or immunity of Petitioners which would require this Court's certiorari jurisdiction under

28 U.S.C.A. §1257(3) since the state court merely held that there was no genuine issue about the fact that Respondent's use of the subject leasehold property satisfied the "public purpose" test of *Dade County v. Pan American, supra*, and F.S. §196.25, *Florida Statutes* (1971).[9] In sum, state law, and the construction by the state courts of that law, was an independent and proper basis for the state court's judgment which this Court usually will not construe or review. *Flourney v. Weiner*, 321 U.S. 253 (1944) and cases cited therein. Petitioners should not be permitted to seek this Court's review merely because they are dissatisfied with the ruling of the state court on the tax exemption of Respondent's leasehold interest.

Despite a conclusionary statement in their petition, Petitioners fail to demonstrate that the judgment below conflicts with or in any way is not in accord with applicable decisions of this Court. Rule 19, *Supreme Court Rules.* Petitioners do cite *Trimble v. Seattle*, 231 U.S. 683 (1914), but just make the unsupported assertion that the state court decision below conflicts with it. (Petition for Certiorari, p. 6). However, in *Trimble*, this Court stated that leasehold interests severed from the public domain, *and "put into private hands . . . with the ordinary incidents of private property"* are taxable. *Id.* at 690. The *Trimble case*, and the state court opinion below are materially different. Respondent has a leasehold interest controlled by the local taxing authorities, the Petitioners herein, which is used for a public purpose under local Florida tax law and which clearly lacks the "ordinary incidents of private property." (R. 29-41). *Trimble v. Seattle, supra.*, at 690. For example, at the conclusion of the lease term,

[9] F.S. §196.199(2)(a), *Florida Statutes* (1973).

the Petitioners acquire complete title to all the improvements constructed by Respondent, and all the equipment free of any right or interest of the Respondent. (R. 29-41). Further, Petitioners control the admission rates, and concessions, the books of Respondent are compelled to be open for inspection by the Petitioners at all times, and the specified insurance coverage of the facility is subject to county approval. (R. 29-41). The Petitioners are paid a percentage of gross revenue from general admissions and gross revenue from incidential income, including concessions, and, finally, the Petitioners' title to the land contains an express deed restriction limiting it to "public purpose" uses. (R. 29-41). Based, in part, on these undisputed facts, the court below held that Respondent's leasehold interest was used for a "public purpose" and therefore entitled to be exempt from ad valorem taxation in 1972. (R. 226-227).

None of these facts evidencing public control over Respondent's leasehold interest were present in *Trimble*, and Respondent's leasehold interest hardly possesses the "ordinary incidents of private property." It is submitted, therefore, that the analogy to *Trimble* cannot be accepted and that the decision below is not in conflict with *Trimble v. Seattle, supra.*

Petitioners cite no other decision of this Court in conflict with the decision of the court below. In fact, prior decisions of this Court are consistent with the opinion below. Reasonable differences or classifications in tax treatment have been consistently upheld by this Court. In *Allied Stores of Ohio v. Bowers*, 358 U.S. 522 (1959), this Court stated the equal protection standard thusly:

> [T]he [equal protection] clause imposes no iron rule of equality, prohibiting the flexibility and variety that are appropriate to reasonable schemes of state taxation.
>
> * * *
>
> To hold otherwise would be to subject the essential taxing power of the State to an intolerable supervision, hostile to the basic principles of our Government and wholly beyond the protection which the general clause of the Fourteenth Amendment was intended to assure.
>
> * * *
>
> *The rule often has been stated to be that the classification 'must rest upon some ground of difference having a fair and substantial relation of the object of the legislation.'*
> *Id.* at 527-8.

See also, Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356 (1973), and cases cited therein; *Citizens Nat. Bank v. Durr*, 257 U.S. 106 (1921); *Armour Packing Co. v. Lacy*, 200 U.S. 451 (1906). This Court has had repeated occasion to sustain discriminations founded upon reasons more obsure than the one alleged in the present case. *American Sugar Refining Co. v. Louisiana*, 179 U.S. 89 (1900); *Bell's Gap R. Co. v. Pennsylvania*, 134 U.S. 232 (1890).

Yet, Petitioners make the unsupported argument that this Court should take certiorari jurisdiction because, they claim, the Respondent's leasehold interest from county land has received preferencial tax treatment in violation of the equal protection clause. Even a cursory review of the record will indicate that this is utterly frivolous.

It is undisputed in the record that Respondent's *leases county-owned land* for the maintenance and exhibition of a *public* marine-life facility, and that such a marine-life facility constitutes a "public purpose" under Florida law. (R. 226-227). Similarly, the Petitioners make no claim that the other "tourist attractions", who allegedly make "the same use" of their property as the Respondent does, *are leasehold interests* and, even if they were leasehold interest, no claim is made that they *lease their lands from the government or public* as the Respondent does. Nor is it contended that they make *exempt* uses of their respective sites. In the absence of any contention that these "other tourist attractions" such as the Monkey Jungle, the Orchid Jungle or the Parrot Jungle, also leased public lands and made an exempt use thereof for 1972 (as the undisputed facts established did occur at the Respondent's leasehold facility), but were taxed nonetheless, how can serious consideration be given to the Petitioners' claim that by granting the Respondent an exemption in 1972, such other facilities were discriminated against in violation of the equal protection provisions of the United States Constitution? Obviously, it cannot, and the ad valorem tax exemption of Respondent's leasehold interest is constitutionally permissible and consistent with the equal protection clause.

Further, there are additional reasons why no reviewable question is present in this case. Petitioners do not attack the statutory scheme in Florida, which permits lessees of public land to apply for and receive ad valorem tax exemption if they make an exempt use of their leasehold interest. In fact, the Petitioners do not even argue the invalidity or repugnancy of the Florida exemption statutes to support their claim of certiorari jurisdiction to this

Court.[10] 28 U.S.C.A. §1257(3). They concede, as they must, that the Florida statutes, under which Respondent applied for and received its exemption for 1972 (and the prior years), are valid and reasonable.

If the statutory exemption scheme in Florida is valid and constitutional, then it seems incongruous that Petitioners can argue any equal protection claim before this Court. Respondent has complied with the applicable ad valorem exemption statutes in Florida, and has qualified under those statutes to have its leasehold interest tax exempt as used for public purposes. (R. 226-227). Respondent has qualified for exemption because it is a lessee of county-owned property which performs a public purpose, and because it applied for such exemption. F.S. §196.199 (2)(a), *Florida Statutes*. If the other "tourist attractions" referred to by Petitioners can qualify under the applicable statutes, (as Respondent has done) and it is shown (which it has not been) that they sought a tax exemption for the same "use" of their leasehold interest, and were *denied* such exemption by the Petitioners, then it is these other "tourist attractions", and not Petitioners, who may have an equal protection claim for discriminatory tax treatment. And such a claim by these other lessees would lie against the Petitioners (Dade County), and not the Respondent herein.

But, this is not the posture of Petitioners' alleged claim. In essence, they claim that they participate in discriminatory tax treatment because "other tourist attrac-

[10]They rely on the specific provision of the third clause of §1257 which provides that certiorari may be from state court judgments which affect a title, right, privilege and immunity under the federal Constitution. (Petition for certiorari, at p. 4.)

tions", who allegedly make the same "use" of their property as Respondent, receive some unspecified but different tax treatment. This is nonsense. There is no evidence in the record that any other lessees are lessees of county-owned land, make an exempt use thereof, and have applied for exemption for the 1972 tax year. Petitioners do not have an equal protection claim merely because the Respondent has qualified for and received an exemption under the Florida exemption statutes (the validity of which they do not attack), and the other "tourist attractions", none of which have ever applied or qualified for an exemption, are taxed. As stated above, if anyone has an equal protection claim subject to the review of this Court, it is these "other tourist attractions", and not Petitioners. And that claim would be against the Petitioners, not the Respondent.

This Court should acknowledge the total want of jurisdiction under 28 U.S.C.A. §1257(3). The petition should be denied.

CONCLUSION

For the foregoing reasons, and upon the authorities cited, the Petition for Writ of Certiorari should be denied. The Petition does not demonstrate any ground for reviewing the judgment of the intermediate state court.

Respectfully submitted,

By: _____
WOODROW M. MELVIN, JR.

MERSHON, SAWYER, JOHNSTON,
DUNWODY & COLE
Of Counsel for Respondent
1600 First National Bank Building
Miami, Florida 33131

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three true and correct printed copies of the foregoing Reply to Petition for Writ of Certiorari to the District Court of Appeal of Florida, Third District were mailed this ____ day of October, 1974, to STUART SIMON, Dade County Attorney, and R. A. CUEVAS, JR., Assistant County Attorney, 1626 Dade County Courthouse, Miami Florida 33130.

WOODROW M. MELVIN, JR.